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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RUSSELL HAMPSHIRE and
WALTER GERNERT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Can a copyright violation form the basis of a charge of interstate transportation of stolen property although a copyright is neither "goods, wares or merchandise" nor susceptible of being "stolen, converted or taken by fraud" as defined by Title 18, United States Code, Section 2314 and as held by United States v. Smith, 686 F.2d 234 (5th Cir. 1982)?

PARTIES TO THE PROCEEDINGS

In addition to Petitioners herein the other parties to the proceeding are John Belmont and Phillip Charles Bernstene who already have filed a Petition for a Writ of Certiorari which has been docketed as John Belmont and Phillip Charles Bernstene, Petitioners, v. United States of America, October Term, 1983, No. 83-769. In January, 1984, the Solicitor General filed a Brief for the United States in Opposition thereto.

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1982 U.S. Code Cong. & Ad.
News 10, 11

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears as Appendix A herein and is reported at 715 F.2d 459.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 7, 1983. A timely petition for

rehearing was denied on December 28, 1983. A copy of the order denying said petition appears as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the Fifth Amendment to the United States Constitution are:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 17 United States Code, Section 506(a) provides in pertinent part:

> Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Title 18, United States Code, Section 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .
>
> * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

After a bench trial on stipulated facts in the United States District Court for the Central District of California, petitioners were convicted of conspiring to transport stolen goods in interstate commerce in violation of

18 U.S.C. §§ 371 and 2314 (Count One), and willfully infringing motion picture copyrights, in violation of 17 U.S.C. § 506(a) (Count Four). E.R. 1230-1231.[1] Petitioner Hampshire was fined $2,500 on Count One and sentenced to two concurrent three-year terms of probation on Counts One and Four. E.R. 1258. Petitioner Gernert was fined in the aggregate of $35,000 on Counts One and Four and sentenced to a one-year term of imprisonment on Count Four, which was suspended and he was granted three years' probation on the condition that he spend five weekends in custody. E.R. 1251.[2]

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1. "E.R." refers to the Excerpt of Record filed in the Court of Appeals.
2. Co-defendants Belmont and Bernstene were likewise convicted and sentenced and have petitioned for certiorari under Docket No. 83-769. Petitioners herein join the issues raised in their co-defendants' petition.

In 1977 as part of an undercover operation to purchase both pornographic and pirated motion pictures the FBI established Gold Coast Specialties, Inc. in Miami through FBI agents Patrick Livingston and Bruce Ellavasky. The agents dealt primarily with Charles Bernstene who initially operated Discount Distributors where petitioners Hampshire and Gernert were employed. Bernstene sold the agents both pornographic and pirated video tapes. Later, Bernstene joined TVX Distributors and petitioners Hampshire and Gernert established Video Club of America. Co-defendant Belmont was identified as a source of major motion pictures for Bernstene. The Stipulation of Facts does not reflect whether the video cassettes alleged to have been pirated

were taped "off the air."[3/] In all the agents bought 442 video cassettes through TVX on three separate occasions in February, May and October 1979.

---

3. The Court of Appeals concluded that most of the copying was "off the air." A-6. Although the Brief for the United States in Opposition to the Petition for Certiorari of Belmont and Bernstein, Docket No. 83-769, p. 9, argues that the illicit copies came from "master tapes" misappropriated from lawful custodians, there is no support in the record for this conclusion.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit, contrary to the Ninth and Eleventh Circuits,[4] has concluded that criminal copyright violations cannot provide the underpinning of a Section 2314 violation. In United States v. Smith, 686 F.2d 234 (5th Cir. 1982), the Fifth Circuit declared:

> "This Court determines, therefore it simply is not at liberty to find that the rights associated with copyright ownership are within the usual or common sense meaning of the phrase 'goods, wares, [or] merchandise." Id. at 239.

In arriving at its decision that a copyright is not synonymous with "goods, wares or merchandise" as described in

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4. In Gottesman v. United States, No. 82-5852 (Feb. 28, 1983) this Court denied certiorari on an unpublished Eleventh Circuit decision raising this issue. With the advent of conflicting published opinions in the Fifth and Ninth Circuits the need for resolution of the issue becomes much more compelling.

Section 2314, the Smith court examined at great length general dictionary definitions, other courts' interpretations of Section 2314 and Congressional intent underlying the copyright law enactments.

> "Likewise, examination of both the general meaning of the phrase 'stolen, converted, or taken by fraud,' and other courts' interpretation of that meaning, reveals that this Court is not at liberty to find that copyright infringement -- at least the infringement involved in the case sub judice -- is the equivalent of stealing, converting or taking by fraud." Smith, supra at 241.

The Ninth Circuit's opinion shunts aside the lengthy analysis of § 2314's applicability in copyright cases found in Smith with the parochial comment:

> "A large percentage of the world supply of entertainment property is found within this circuit. If, indeed, the Fifth Circuit takes a different view of

the matter, we are not bound to follow it."

The Smith court had distinguished United States v. Drebin, 557 F.2d 1316 (9th Cir. 1977), reh'g denied, 572 F.2d 215, cert. denied, 436 U.S. 904 (1978), which held copies of films are goods and merchandise and that illicit copying is theft within the meaning of Section 2314, because Drebin involved works which were actually stolen instead of being copied "off the air." The Ninth Circuit, with almost no discussion, observed that the distinction made in Smith was not "meaningful in terms of the statute." However, the importance of just such a distinction is made manifest by this Court's decision in Universal City Studios, Inc. v. Sony Corp. of America, ____ U.S. ____ (1984). Clearly, the distinction made by Smith is meaningful and should have been addressed in the Ninth Circuit's opinion.

The Ninth Circuit's opinion also misconstrues the effect of new copyright legislation enacted after Drebin, supra, was decided. In enacting 18 U.S.C. § 2319 (the new Piracy Act) Congress recognized that § 2314 (part of the same chapter) does not reach copyright infringement. The Ninth Circuit's opinion argues that § 2319(a) does not demonstrate a congressional acknowledgment of the limitations of § 2314 because it states:

> "Whoever violates section 506(a) . . . shall be punished as provided in subsection (b) of this section and such penalties shall be in addition to any other provisions of Title 17 or any other law."

However, the italicized language was added to Section 2319 to insure that civil forfeiture and seizure remedies extant under Title 17 would not be abrogated. S.Rep. No. 274, 97th Cong. 2nd Sess. 2, reprinted in 1982 U.S.Code Cong.

and Ad. News 127, 128.

Moreover, the Ninth Circuit's opinion fails to discuss the fact that the rule of lenity applies when, as here, there is ambiguity concerning the ambit of criminal statutes, United States v. Batchelder, 442 U.S. 114, 121 (1979), Rewis v. United States, 401 U.S. 808, 812 (1971).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

W. MICHAEL MAYOCK
Attorney for Petitioners
RUSSELL HAMPSHIRE and
WALTER GERNERT

APPENDIX A

FOR PUBLICATION

FILED
September 7, 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court of
Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. JOHN BELMONT, Appellant.	No. 82-1730 D.C. No. CR 81-00623-02
UNITED STATES OF AMERICA, Appellee, vs. PHILIP CHARLES BERNSTENE, Appellant.	No. 82-1732 D.C. No. CR 81-00623-01
UNITED STATES OF AMERICA, Appellee, vs. RUSSELL HAMPSHIRE, Appellant.	No. 82-1733 D.C. No. CR 81-00623-03
UNITED STATES OF AMERICA, Appellee, vs. WALTER GERNERT, Appellant.	No. 82-1734 D.C. No. CR 81-00623-05 O P I N I O N

Appeal from the United States District

Court for the Central District of California
Honorable Robert J. Kelleher, Presiding
Argued and submitted August 2, 1983
Before: CHOY, GOODWIN and ANDERSON, Circuit Judges

GOODWIN, Circuit Judge

After a bench trial on stipulated facts, John Belmont, Phillip Bernstene, Russell Hampshire and Walter Gernert were convicted of conspiring to commit an offense against the United States, 18 U.S.C. § 371, (transportation of stolen goods in interstate commerce, 18 U.S.C. § 2314), and willfully infringing motion picture copyrights, 17 U.S.C. § 506(a). The charges grew out of sales of videotape cassettes of copyrighted motion pictures.

In this consolidated appeal all appellants argue that the government failed to establish the absence of a "first sale," a necessary element of copyright infringement, and that traffic in unauthorized cassettes cannot form the

basis of a conviction under 18 U.S.C. § 2314.

Bernstene argues that his conviction cannot stand because he was entrapped.

Hampshire and Gernert argue that the government failed to establish the $5,000 jurisdictional minimum of § 2314 and that under a strict construction of the stipulation the district court should have convicted them on the misdemeanor copyright count only and not on the felony charge. Hampshire also argues that the evidence was insufficient to establish that he was part of the conspiracy. We affirm.

As part of an undercover operation, FBI agents Patrick Livingston and Bruce Ellavasky established Gold Coast Specialties, Inc. in 1977 and pretended to be interested in purchasing pirated motion pictures. The agents primarily dealt with Bernstene, who until 1979 operated

Discount Distributors with Gernert and Hampshire. In 1979, Bernstene left Discount Distributors to join TVX Distributors. Gernert and Hampshire established Video Club of America. Belmont was Bernstene's source of motion pictures. The agents bought 442 video cassettes through Discount Distributors and TVX on three separate occasions in February, May and October 1979.

The principal issue in this appeal is whether 18 U.S.C. § 2314 applies to the kind of theft involved in this case. It is a federal felony to transport "in interstate or foreign commerce any goods, wares [or] merchandise . . . of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud . . . ." Relying on United States v. Smith, 686 F.2d 234 (5th Cir. 1982), appellants argue that transportation of unauthorized copies is not an offense

under § 2314. They contend that copyrights are not "goods, wares or merchandise" nor can they be "stolen, converted or taken by fraud" within the meaning of the statute. This argument, however, is foreclosed by Ninth Circuit law, which appellants neither cite nor discuss.

In United States v. Drebin, 557 F. 2d 1316, 1332 (9th Cir. 1977), reh'g denied, 572 F.2d 215, cert. denied, 436 U.S. 904 (1978) defendants were convicted under both 18 U.S.C. § 2314 and 17 U.S.C. § 506(a) of crimes involving the wrongful appropriation of motion pictures. Drebin held that copies are goods or merchandise and that illicit copying is theft within the meaning of the statute. Accord United States v. Berkwitt, 619 F.2d 649, 656-58 (7th Cir. 1980) (by implication); United States v. Whetzel, 589 F.2d 707, 710 n.10 (D.C. Cir. 1978); United States v. Atherton, 561 F.2d 747, 752 (9th Cir.

1977); United States v. Sam Goody, Inc., 506 F. Supp. 380, 387-91 (E.D. N.Y. 1981).

We recognize that in Drebin the original copyrighted works were in fact stolen whereas here most of the copying was "off the air" with no proof of interstate transportation of stolen originals. The distinction between "off the air" copying and stealing of original copyrighted works was the basis upon which the Smith court distinguished Drebin. Smith, 686 F.2d at 243 n.17. We do not find the distinction meaningful in terms of the purpose of the statute. The evil which Congress addressed in the National Stolen Property Act was the interstate traffic in stolen property. The rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property.[1/] When society

creates new kinds of property and thieves devise new ways of appropriating that property to their own use, the law against transporting property expands with the growth in the varieties of property. There is no utility in the sort of sterile formality urged upon us by these defendants. A large percentage of the world supply of entertainment property is generated within this circuit. If, indeed, the Fifth Circuit takes a different view of the matter, we are not bound to follow it.

We also recognize that after Drebin was decided Congress enacted new copyright legislation that increases the penalties for copyright infringement.[2/] Appellants argue that this action evidences congressional intent or understanding that the § 2314 does not reach copyright infringement.

The argument is unpersuasive. Congress' concern about criminal copyright violations contains no evidence of intent to limit the scope of § 2314. Rather, the new Piracy Act evidences the contrary intent: "Whoever violates section 506(a) . . . shall be punished as provided in subsection (b) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law." 18 U.S.C. § 2319(a).[3/] It is also a cardinal principle of construction that repeals by implication are not favored. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.'" United States v. Borden Co., 308 U.S. 188, 198-99 (1939) (quoting Red Rock v. Henry, 106 U. S. 596, 601-02 (1883)).

In view of the clear intent of Congress to treat the wrongful copying of sound and video tapes and motion picture materials as a species of theft, it is only logical to hold that the interstate transportation of the stolen copies is a violation of § 2314.

None of the other issues in the case justifies extended comment. The government proved by abundant circumstantial evidence that the tapes had an illegitimate origin. The government's case sufficiently demonstrated the absence of a first sale. United States v. Moore, 604 F.2d 1228, 1232-33 (9th Cir. 1979).

Bernstene was not entrapped. The government proved that he was predisposed to commit the crime. See United States v. Shapiro, 669 F.2d 593, 597 (9th Cir. 1982).

Because there was only one overall conspiracy, the district court properly aggregated the value of all shipments in

determining whether the jursidictional amount required by § 2314 had been satisfied. See Schaffer v. United States, 362 U.S. 511, 517 (1960). The amount of the sales far exceeded the $5,000 limit, and the sale price is valid evidence of the value. Even after deducting the cost to the thieves of any blank tapes that they purchased, the added value of the tapes which resulted from the piracy exceeded the limit.

Evidence of at least a slight connection of Hampshire to the conspiracy was sufficient to make him liable. See United States v. Dunn, 564 F.2d 348, 356-57 (9th Cir. 1977).

Finally, Hampshire and Gernert's argument that under the stipulation the district court should have convicted them on the misdemeanor copyright count only and not on the felony § 2314 charge is frivolous. The stipulation is not

ambiguous; it allows the district court to convict on both counts or on only one count.

The judgments are affirmed.

FOOTNOTES

United States v. Belmont, et al, Nos. 82-1730, 82-1732, 82-1733, 82-1734

1/ Cf. United States v. Greenwald, 479 F.2d 320, 322 (6th Cir.) (theft of chemical formulations within the National Stolen Property Act), cert. denied, 414 U.S. 854 (1973); United States v. Seagraves, 265 F.2d 876, 880 (3d Cir. 1959) (the phrase "goods, wares, merchandise" in 18 U.S.C. § 2314 comprehends all personal property that is "ordinarily a subject of commerce").

2/ After Drebin was decided, the new Copyright Act of 1976 came into effect, Pub. L. No. 94-553, 90 Stat. 2541 (effective Jan. 1, 1978) and Congress enacted the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (amending 17 U.S.C. § 506(a), 18 U.S.C. § 2318 and adding 18 U.S.C. § 2319).

3/ The Senate Judiciary Committee specifically added the italicized language quoted in the text to make clear that the Piracy Act "supplement[s[existing remedies contained in the copyright law or any other law." S. Rep. No. 274, 97th Cong., 2nd Sess. 2, reprinted in 1982 U.S. Code Cong. & Ad. News 127, 128.

APPENDIX B

FILED
DEC 28, 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. RUSSELL HAMPSHIRE, Appellant.	No. 82-1723 DC No. CR 81-00623-03
UNITED STATES OF AMERICA, Appellee, v. WALTER GERNERT, Appellant.	No. 82-1724 DC No. CR 81-00623-05 O R D E R

BEFORE: CHOY, GOODWIN and ANDERSON

The panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court was advised of the

suggestion for rehearing en banc and no judge called for a vote on whether to rehear the case en banc. (Fed. R. App. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF LOS ANGELES)

I am a citizen of the United States, a member of the Bar of the United States Supreme Court, and a resident of the county aforesaid. I am over the age of 18 years and not a party to the within entitled action; my business address is 10100 Santa Monica Boulevard, Suite 2600, Los Angeles, California 90067.

On February 27, 1984, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing a true copy in a sealed envelope, with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

I certify under penalty of perjury that

the foregoing is true and correct and was executed on February 27, 1984, at Los Angeles, California.

W. MICHAEL MAYOCK
Member of the Bar of the
United States Supreme Court
and Attorney for Petitioners
RUSSELL HAMPSHIRE and
WALTER GERNERT